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COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Whether petitioner has been deprived of any fundamental or substantial rights by the trial court within the scope and definition of the accepted principles inherent in due process.

2. Whether the assertion by a State's witness of the privilege against self incrimination prejudiced petitioner's substantial rights and deprived him of a fair and impartial trial.

3. Whether the "harmless error" rule in the federal system or the appropriate New Jersey rule applies and whether the writ of certiorari sought in this court may be granted only on a lack of conformity with the principles enunciated by the Fourteenth Amendment rather than on the "harmless error" rule.

4. Whether there was any error in the admission of testimony.

STATUTES AND RULES OF COURT INVOLVED

New Jersey Revised Statutes, Chapter 103, Section 1, Title 2:

> "Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offenses of an indictable nature at common law, and not expressly provided for by statute, shall be misdemeanors."

Rule 52 of the Federal Rules of Criminal Procedure:

> "(a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Rule 52, Title 18, U. S. C.

Rule 1:5-1, Rules of Supreme Court of New Jersey:

> "(a) In criminal causes, errors apparent on the face of the judgment record shall be reviewable as heretofore. Error in the admission or rejection of testimony, or in the charge of the court, or in the refusal to charge as requested by the defendant, or in the denial by the court of any matter resting in discretion, or in any other ruling or order made during the course of the trial, shall be cause for reversal if specific objection thereto was made *and it appears from the entire record of the proceedings had upon the trial that the defendant thereby suffered manifest wrong or injury.* (emphasis supplied). The court may, however, notice plain errors affecting substantial rights of the defendant, although they were not brought to the attention of the trial court. If it shall appear, after challenge interposed by the defendant in the appellate court, that the verdict was against the weight of the evidence, the judgment shall be reversed and a new trial ordered. A verdict

of a jury shall not be set aside as against the weight of the evidence unless it clearly and convincingly appears that the verdict was the result of mistake, partiality, prejudice or passion."

COUNTER-STATEMENT OF FACTS

On July 25, 1951, the petitioner, Chief of Police of the Borough of Lodi, County of Bergen, State of New Jersey, was indicted by the Bergen County Grand Jury (R. 1a-28a), for non-feasance in office. The indictment contained nine counts. Count 8 was abandoned by the State on the day of trial, and it was accordingly dismissed. (R. 39a).

The trial was had before a jury. It started September 22, 1952, and was concluded October 22, 1952. The State produced 57 witnesses. The petitioner did not take the witness stand.

On motion the Court dismissed Counts 2, 3, and 4, respectively (R. 1282a, R. 1283a). The jury rendered a verdict of guilty as to Counts 1, 5, 6, 7, and 9; and on December 5, 1952, the Court suspended sentence on Count 1, and sentenced petitioner to six months in the county jail on Counts 5, 6, 7, and 9, respectively, and sentences to run concurrently, and fined petitioner $1,000 (R. 1339a).

All nine counts of the indictment are similarly patterned, except that the fifth paragraph of each count states a different specific place where and the times when gambling in the Borough of Lodi was conducted. Each count identified the petitioner as the Chief of Police of said Borough and County; and it was stipulated at the trial that petitioner was such public officer from November 20, 1920, to September 30, 1950 (R. 41a).

Each count alleges that petitioner failed in his "public duty of using and exercising all proper, reasonable, and

effective means, and all lawful means in his power and diligence for the detection, apprehension, arrest, and conviction of offenders against the laws," "for preserving the public peace and insuring good order" in the Borough, and for "suppressing" as disorderly houses, places used for gaming, bookmaking, lotteries, and so on.

Further, that he had under his direction and control the police force of Lodi for the proper enforcement of the public duties so enjoined upon him by law. Each count alleges defendant knew of such unlawful activity, and that he "unlawfully and wilfully did neglect, fail and omit to use and exercise * * * all lawful means within his power * * * but, on the contrary, * * * unlawfully did suffer and permit gambling * * * unlawfully and wilfully did neglect and omit to perform the said public duties so enjoined upon him * * *."

Paragraph 5 of each count of which defendant was found guilty refers to:

Count 1, Costa's Barn, on Route 6
Count 5, 7 Nicholson Street
Count 6, 334 Main Street
Count 7, 225 Garibaldi Avenue
Count 9, 11 Terhune Avenue

As the defendant points out in his brief (Db50 and Db 51) the State's 57 witnesses may reasonably be classified in four (4) groups (a) the telephone company and the telegraph company employees, who testified as to the installation of telephones and tickers at the various locations in Lodi, (b) the participants in the book-making activities (Db50-30), "These were the Erickson employees, the Jula employees, and the Wright employees. There is no doubt about the fact that they were engaging in illegal gambling."; (c) (Db51-16) " * * * the persons who attended the gambling casinos to do some illegal gambling with dice or other like games of chance."; and (d) the operators and employees of the gambling casinos, the stickmen, the restaurant manager, the credit manager, the porter, and others.

ARGUMENT

POINT I

Petitioner has not been deprived of any fundamental or substantial rights by the trial court within the scope and definition of the accepted principles inherent in due process.

The Supreme Court of the State of New Jersey has decided the instant case in accord with applicable decisions of this Court. The majority opinion in the State Court deals exhaustively with the pertinent law both in this Court and in the highest court of New Jersey. See Point III (R. 1354 to 1357). In part, we quote from this opinion, as follows:

> "But there was no warrant whatever for the intimation that the accused's trial attorney was also the attorney for the ' big five ', and the insinuation that the operator of Costa's Barn was in league with him when he was assistant to the Prosecutor of the County. This was an indefensible maneuver for which no justification could be offered on the oral argument; and it is no answer to say that it came in the course of a long trial in which tempers flared". (R. 1355)

The majority opinion having defined the conduct of the State's attorney then proceeded to analyze its consequences in the following language:

> "Yet we are of the view that the danger of this deviation from the proprieties was fully remediable by a cautionary instruction to the jury to disregard the insinuative queries as utterly irrelevant; and so the motion for a mistrial was ill-advised as a drastic measure not in keeping with the (fol. 1358) requirements of justice in the particular circumstances. There is no suggestion that, in itself, proof of such legal representation of the so-called ' big five ' was

harmful; and the witness Guarini made a categorical denial of any such relationship or conversation, this or any other, with the accused's trial attorney when he was an assistant to the Prosecutor; indeed, he was quite emphatic in saying that he did not know the accused's attorney at that time. (R. 1355)

* * *. . . "the prosecuting attorney . . . is under a . . . duty to abstain from conduct prejudicial to a fair trial . . . but where, as here, it is abundantly clear that the impropriety did not have an evil consequence, and at all events was plainly a subject for an admonitory instruction to the jury, if the accused deemed it prejudicial, there was no ground for a mistrial. (R. 1355-1356). A motion for a mistrial is addressed to the sound discretion of the court; and the denial of the motion is reviewable only for an abuse of discretion. The power is to be exercised with the greatest caution, in the furtherance of justice between the accused and the State. Vide Logan v. United States, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429 (1892); Simmons v. United States, 142 U. S. 148, 12 S. Ct. 171, 35 L. Ed. 968 (1891). See, also, 86 A. L. R. 936. Such is our judicial policy. Unless the vice is plainly ineradicable by an instruction to the jury, a mistrial is not allowable of (fol. 1359) right. And, absent a specific request by counsel, a curative instruction is not ordinarily the duty of the trial judge, where a mistrial is refused. Compare State v. Corson, 108 N. J. L. 12 (S. Ct. 1931); State v. Terry, 91 N. J. L. 539 (E. & A. 1918); State v. Hauptmann, 115 N. J. L. 412 (E. & A. 1935). See, also, State v. Lynch, 103 N. J. L. 64 (E. & A. 1926.

* * * "The accused plainly did not suffer prejudice by the interrogation offered as a ground for mistrial. The questions elicited no adverse testimony; the witness denied knowing the attorney at the time and unequivocally repelled the suggestion of contact

with him; and the State's attorney did not intimate personal knowledge contra." (R. 1356)

Petitioner's position is that the essential principles of a fair and impartial trial inherent in due process have been denied him by the refusal of the trial court to declare a mistrial. The case of *Brown v. Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed 682 (1936) is thoroughly discussed infra. Petitioner further relies on *Cassell v. State of Texas*, 339, U. S. 282, 70 S. Ct. 639, (1950) and quotes certain dicta from the dissenting opinion of Justice Jackson who wrote (Pb33):

> "The trial jury hears the evidence of both sides and chooses what it will believe. In so deciding, it is influenced by imponderables-unconscious and conscious prejudices and preferences—and a thousand things we cannot detect or isolate in its verdict and whose influence we cannot weigh." (Pb33).

Petitioner has taken this quotation out of context and this dicta should be read in the light of the preceding sentence which reads:

> "It is obvious that discriminatory exclusion of Negroes from a trial jury does, or at least, may prejudice a Negro's right to a fair trial, and that a conviction so obtained should not stand." (pages 301-302)

Even more important is the fact that this case determines the fundamental question of the purposeful discrimination against Negroes in the selection of the grand jury. Mr. Justice Jackson's dissent is from a reversal of the conviction of the defendant as decided by the majority of this Court.

In fact, Mr. Justice Jackson's opinion states the applicable law, in the instant case, with clarity, as follows:

> "In setting aside this conviction, the Court is moved by a desire to enforce equality, in that realm where, above all, it must be enforced—in our judicial system. But this conviction is reversed for errors that have

nothing to do with the defendant's guilt or innocence, or with a fair trial of that issue. *This conflicts* with *another principle important to our law, viz., that no conviction should be set aside for errors not affecting substantial rights of the accused.*" (page 299) (emphasis supplied)

The petitioner cites *Brown v. Mississippi, (supra)* (R46) in support of his contention that the essentials of a fair and impartial trial inherent in due process were not accorded to him. This case differs radically with the case at bar. Furthermore, the instant case falls outside of the scope of "the essentials of a fair and impartial trial inherent in due process" as defined in the *Brown case.*

The defendants in the *Brown case* were convicted of the crime of murder on confessions extorted from them by police officers using brutality and violence. They were indicted on one day and arraigned for pleading on the same day. Trial was begun on the next day and concluded the following day. They were found guilty and sentenced to death.

Aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury. The facts of merciless whippings and brutality were not only undisputed but were admitted to have been done by officers of the state and all this was known to everybody connected with the trial, and during the trial, including the state's prosecuting attorney and the trial judge presiding. In an opinion by Chief Justice Hughes, the court held,

> "The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Snyder v. Massachusetts, supra; Rogers v. Peck, 199 U. S. 425, 434, 26 S. Ct. 87, 50 L. Ed. 256. The state

may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232; Snyder v. Massachusetts, supra. But the freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The state may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. Moore v. Dempsey, 261 U. S. 86, 91, 43 S. Ct. 265, 67 L. Ed. 543. The state may not deny to the accused the aid of counsel. Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527. Nor may a state, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is 'but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.' Mooney v. Holohan, 294 U. S. 103, 112, 55 S. Ct. 340, 342, 79 L. Ed. 791, 98 A. L. R. 406. And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' Hebert v. Louisiana, 272 U. S. 312, 316, 47 S. Ct. 103, 104, 71 L. Ed. 270, 48 A. L. R. 1102. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these peti-

tioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

* * * That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. Moore v. Dempsey, supra. We are not concerned with a mere question of state practice, or whether counsel assigned to petitioners were competent or mistakenly assumed that their first objections were sufficient.

* * * The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective.

In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner."

The essential elements of due process as delineated in the quotation from the *Brown case* above cited have not been violated in the case at bar because of the absence of any direct infringement of the rights of the petitioner himself. There was no offense to "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" *Brown v. Mississippi (supra.)*. The threat of the trial court to send the witness Guarini back to jail in the light of Guarini's background including his commonly-known reputation of

being one of the "big five" of Bergen County gambling operations and his conviction and sentence and that Guarini's attorney was petitioner's attorney could hardly be called prejudicial to any rights of the petitioner. This was a derogatory description of the witness, but this cannot be evaluated on an equal plane with (1) the substitution of "a jury trial" with "trial by ordeal"; (2) the hurrying of an accused to conviction under mob domination; (3) the denial to the accused of the right to counsel; (4) "the deliberate deception of court and jury by the presentation of testimony known to be perjured"; (5) the contriving of a conviction by state authorities "solely upon confessions obtained by violence".

It is respectfully submitted that the *Brown case* is not applicable to the factual situation in the instant case and actually supports the contention of the State in seeking a denial of the issuance of the writ of certiorari sought by the petitioner.

In summing up the argument up to this point, it can be stated that the essentials of a fair trial inherent in due process in the *Cassell* and *Brown* cases are therefore based upon the solid ground that substantial rights of the accused must be affected before a reversal of a conviction can be ordered. The substantial right in the *Cassell* case was the purposeful discrimination exercised against Negroes in selecting the grand jury. The substantial right in the *Brown* case was the extortion of a confession from the defendants by brutality and violence known both to the prosecuting attorney and the trial judge at the time of the trial. No such substantial right in any sense of the word "substantial" is involved in the instant case.

Petitioner quotes certain dicta (Pb33, 34) from the case of *Williams v. Kaiser,* 323 U. S. 471, 475, 65 S. Ct. 363, 366. This case holds that the right to counsel in a criminal prosecution in a capital case is protected by the Fourteenth Amendment of the Federal Constitution and that the defendant was deprived of this right.

The right to counsel is a fundamental right and its deprivation is violative of the Fourteenth Amendment. In the instant case, no such violation occurred, nor was any other basic right of the petitioner violated.

The case of *Stroble v. California,* 343 U. S. 181, 72 S. Ct. 599, involved the matter of inflammatory and prejudicial newspaper reports published in the Los Angeles press against the defendant who was indicted and convicted of the murder of a girl six years of age. It also involved the action of the District Attorney who released to the press, on the day of defendant's arrest, certain details of the confession which defendant had made, and the statement that the defendant was guilty and sane. The factual situation in this case is sharper and more aggravated than that which exists in the instant case. The Court held that the defendant was not deprived of due process (page 195), and while the Court deprecated the actions of the District Attorney in his statements to the press, nevertheless, these actions "did not necessarily prevent a fair trial." (page 193).

In the case of *Frank v. Magnum,* 237 U. S. 309, 334, 35 S. Ct. 582 (1915) the Court stated:

> "This familiar phrase—whether the state, taking into view the entire course of its procedure, has deprived him of due process of law—(parenthetic statement supplied) does not mean that the operations of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the state courts, or exercise any general review over their proceedings, *but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases.*" (emphasis supplied)

The dissenting opinion of Mr. Justice Holmes in the same case, 237 U. S. 347, asserts:

> "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted."

At this point, it is necessary to place the instant case in a proper perspective and relationship with the applicable decisions of this Court interpreting the Fourteenth Amendment. The petitioner was convicted by a jury for non-feasance in his office as Chief of Police. Specifically he was charged with knowing and wilfull failure of his official duties in relation to gaming on certain premises. The burden of proof rested upon the state to establish the gambling operations, widespread and notorious as they were, at certain places in the Borough of Lodi. As stated by the majority opinion of the Supreme Court of New Jersey:

> "In its nature the case made by the State involved witnesses of unsavory character; and the State's bonafide efforts to adduce relevant evidence from such witnesses cannot be denounced as incompatible with fair play." (R. 1355)

The witness Guarini was called to establish his conduct of Costa's Barn as a gaming house. The reference to his plea of non vult to an indictment charging the keeping of a disorderly house for the purpose of refreshing his recollection is unexceptionable under New Jersey decisions. This does not come within the scope and definition of the principles of due process because it is procedural and even if irregular cannot be the subject of re-

view by this Court.

In the same category is the denial of the motion for a mistrial by the trial court and the absence of a specific request by counsel for petitioner for a curative instruction. These are also matters of procedure which the decisions of this Court will not disturb. (R. 1356). Petitioner was not prejudiced and there was no violation of the fundamental conception of a fair trial within the accepted principles inherent in due process.

POINT II

The assertion by a State's witness of the privilege against self incrimination did not prejudice petitioner's substantial rights nor deprive him of a fair and impartial trial.

Petitioner states (at page 45) the following:

> "With respect to the witness Marchese, whose testimony has hereinbefore been set out at some length, the prosecutor knew that the witness was then under indictment for maintaining a gambling house in his premises, and was also a police captain and subordinate of petitioner, *and that the witness would plead his privilege against self-incrimination. He knew, therefore, that the witness would not only refuse to answer any questions pertaining to the facts directly incriminating him, but also as to any fact which might form a link in the chain of evidence establishing his liability to punishment, penalty or forfeiture. .*" (emphasis supplied).

Petitioner cites *Rogers v. United States* 340 U. S. 367 in support of his argument, when in actuality, this case holds exactly the opposite of his contention. The court, in an opinion by Chief Justice Vinson, held:

> "If petitioner desired the protection of the privilege against self-incrimination, she was required to claim

it." (at page 370) citing United States v. Monia, 1943, 317 U. S. 424, 427, 63 S. Ct. 409, 410, 87 L. Ed. 376.

The court continued: (page 371)

"The privilege 'is deemed waived unless invoked'. United States v. Murdock, 1931, 284 U. S. 141, 148, 52 S. Ct. 63, 64, 76 L. Ed. 210. "Furthermore, the decisions of this court are explicit in holding that the privilege against self-incrimination 'is solely for the benefit of the witness, and is purely a personal privilege of the witness', citing (in footnote, page 371) Hale v. Henkel, 1906, 201 U. S. 43, 69, 26 S. Ct. 370, 376, 50 L. Ed. 652 and McAllister v. Henkel, 1906, 201 U. S. 90, 91, 26 S. Ct. 385, 50 L. Ed. 671.

It is therefore apparent that the only way the prosecutor in the instant case could ascertain whether the witness Marchese would invoke the privilege against self-incrimination would be to call him as a witness. The fact that the witness was himself under indictment does not in any way alter the quality of the privilege against self-incrimination, nor does it change the requirement that the privilege must be invoked by the witness personally.

Petitioner therefore seems to be questioning the propriety or the ethics of the prosecutor in calling Marchese to the stand when he states at page 45. . . . that "his statement. . . . was reprehensible since there is not an iota of evidence of a tie-up between the petitioner and this witness, or any other violator of the law". It is respondent's contention that the prosecutor would have been derelict in his duty if he had not called Marchese as a witness. The fact that Marchese invoked the privilege guaranteed to him by the Fifth Amendment and that therefore the "tie-up between the petitioner and this witness or any other violator of the law" could not be clearly shown was ascertained only after Marchese left the witness stand.

Petitioner also cites *Arndstein v. McCarthy*, 254 U. S. 71, 41 S. Ct. 26 (1920) in support of the same argument as advanced in the case of *Rogers v. United States (supra)*. This case has no application whatsoever to the instant case.

The point made by petitioner (Pb47) in the case of the testimony of the fifty-seven (57) witnesses called by the State to the effect that the prosecutor submitted "irrelevant and incompetent cumulative evidence solely for the purpose of befogging the issues and thus bring about the suppression and not the discovery of the truth" is without merit for the reason that the petitioner has not specified the testimony so characterized by him to show its cumulative effect. In the case of both Guarini and Marchese, parts of whose testimony have been included in the petition, a reading of same will indicate forcefully that the prosecutor sought the discovery of the truth and not the suppression of it and succeeded in the case of Guarini despite this witness's reluctance and hostility and did not succeed in the case of Marchese because this witness invoked his privilege under the Fifth Amendment.

POINT III

The "harmless error" rule in the Federal system differs from the appropriate New Jersey rule and the latter applies in the instant case as a procedural matter; the writ of certiorari sought in this Court may be granted only on a lack of conformity with the principles enunciated by the Fourteenth Amendment and not on the "harmless error" rule.

Rule 52 of the Federal Rules of Criminal Procedure provides:

"(a) Harmless error. Any error, defect, irregularity

or variance which does not affect substantial rights shall be disregarded.

(b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Rule 52, Title 18, U. S. C.

The applicable New Jersey rule is as follows:

"(a) In criminal causes, errors apparent on the face of the judgment record shall be reviewable as heretofore. Error in the admission or rejection of testimony, or in the charge of the court, or in the refusal to charge as requested by the defendant, or in the denial by the court of any matter resting in discretion, or in any other ruling or order made during the course of the trial, shall be cause for reversal if specific objection thereto was made *and it appears from the entire record of the proceedings had upon the trial that the defendant thereby suffered manifest wrong or injury*. (emphasis supplied). The court may, however, notice plain errors affecting substantial rights of the defendant, although they were not brought to the attention of the trial court. If it shall appear, after challenge interposed by the defendant in the appellate court, that the verdict was against the weight of the evidence, the judgment shall be reversed and a new trial ordered. A verdict of a jury shall not be set aside as against the weight of the evidence unless it clearly and convincingly appears that the verdict was the result of mistake, partiality, prejudice of passion". Supreme Court of New Jersey, Rule R. R. 1:5-1.

In *Bute v. People of State of Illinois*, 333 U. S. 640, 656, 68 S. Ct. 763, 772, (1948), Mr. Justice Burton declared:

> "... this Court has decided that the Fourteenth Amendment does not, through its due process clause or otherwise, have the efefct of requiring the several states to conform the procedure of their state criminal trials to the precise procedure of the federal courts, even to the extent that the procedure of the federal courts is prescribed by the Federal Constitution or Bill of Rights ."

and at page 659, 773:

> "So here the procedure followed by Illinois (failure to offer or assign counsel) (parenthetic statement supplied) should not be held to violate the standard of permissible process of law broadly recognized by the Fourteenth Amendment unless the Illinois procedure violates 'the very essence of a scheme of ordered liberty' and that its continuance would violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (long list of cases cited by the court at this point).

In *Bihn v. United States*, 328, U. S. 633, 66 S. Ct. 1172, (1946) at page 638, (also cited by petitioner in his brief) (Pb36), the question to be decided by this court involved the charge to the jury. The court held that the charge erred because it put the burden on the defendant to prove her innocence by proving the identity of some other person as the thief. On the question of the "harmless error" phase of the case, Mr. Justice Douglas stated:

> "The 'harmless error' statute, Judicial Code § 269, 28 U. S. C. A. § 391, means that a criminal appeal should not be turned into a quest for error. It does not mean that portions of the charge are to be read in isolation to the full charge and magnified out of all proportion to their likely importance at the trial. Boyd v. United States, 271, U. S. 104, 107, 46 S. Ct. 442, 70 L. Ed. 857. Yet as stated in McGandless

> v. United States, 298 U. S. 342, 347, 348, 56 S. Ct. 764, 766, 80 L. Ed. 1205 'an erroneous ruling which related to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial' ".

The case of *Glasser v. United States*, 315 U. S. 62, 62 S. Ct. 457 (1942) sets forth the proposition which prevails in the instant case at page 83:

> "Perhaps the court did not attain at all times that thorough-going impartiality which is the ideal, but our examination of the record as a whole leads to the conclusion that the substantial rights of the petitioner were not affected. The trial was long and the incidents relied on by petitioners few. We must guard against the magnification on appeal of instances which were of little importance in their setting. Cf. United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 240, 60 S. Ct. 811, 852, 84 L. Ed. 1129; Goldstein v. United States, 8 Cir. 63 F. 2d 609, United States v. Warren, 2 Cir., 120 F. 2d 211".

In the instant case, the maneuver of the state's attorney is involved rather than the conduct of the trial judge as in the *Glasser* case. Otherwise the analogy fits perfectly. For the petitioner did not suffer prejudice by the interrogation offered as a ground for mistrial. Petitioner has quoted in his brief twelve (12) pages of excerpts from the transcript of testimony (Pb7 to Pb18) relating to the reluctant State's witness, Anthony Guarini, and the difficulty had with him, over defendant's many overruled objections, to get him to state how he had pleaded to an indictment charging he maintained a disorderly house at Costa's Barn. Defense counsel interposed an objection when the fact was interjected by the prosecution that defense counsel also represented the witness Guarini when the latter entered a plea of guilty to an indictment charging him with operating a gaming establishment.

(R. 446). The witness Guarini immediately adopted the cue given to him by the objection of defense counsel. Guarini professed ignorance of the operating dates charged in another indictment relative to Costa's Barn. (R. 446). Defense counsel and the witness persisted in this course. (R. 448 to R. 457). It was the right and duty of the State to develop the true circumstances surrounding these pleas and in view of defense counsel's statements in the presence of the jury (R. 449 to R. 451) the petitioner was benefited from this exchange rather than prejudiced, and the very thing that defense counsel desired, was done for him. (R. 451).

Furthermore, it is submitted that petitioner does not allege under R. R. 1:5-1 (supra) that the jury was biased or prejudiced, or that the verdict rendered was the result of bias, passion, prejudice or partiality. It will be noted that this challenge is only made on appeal after conviction and sentence and in seeking this writ (Pb44). The "prejudicial atmosphere of the trial" alleged (Pb44) on appeal to the New Jersey Supreme Court and in support of this writ must be viewed in the light of the fact that no motion for a continuance was made before trial, no challenge to the array, or to the polls, were at any time interposed, nor was any motion made for a change of venue, or for a foreign jury, nor was any objection entered upon completion of the selection of the jury that it could not impartially and fairly try the issue.

In fact, the petitioner in his brief before the Appellate Court below conceded (Db29-22):

> "There is in the record page after page of 'testimony' not competent to prove anything more than the fact we now know, that 'gambling offenses' took place in Lodi before the time charged in the indictment, during the time charged and after the time charged. . . We now know that there was 'big time gambling' by Erickson and his associates; by Doto and the so-called 'big five' . . . One must read the entire record

to realize that this 'hysteria' was effectively promoted or revived."

Petitioner relies on the cases of *Vierick v. United States*, 318 U. S. 237, 63 S. Ct. 561, (1943) and *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629 (1935) (Pb37-38).

These cases do not involve the due process clause but rather the application of statutory rules for granting a new trial for errors committed in the United States District Courts respectively. The *Berger* case interpreted Section 391 of Title 28 of the United States Code. (Now Rule 52a).

These two cases are likewise distinguishable from the instant case in a very substantial manner.

The *Vierick* case involved conduct of the prosecuting attorney (pages 247, 566) which prejudiced petitioner's right to a fair trial. In his closing remarks to the jury, the United States Attorney appealed to passion and prejudice by reference to war in a case charging a foreign agent with failure to register. The prosecutor stated that the American people were relying on the jury for protection and that the jury had a "duty to perform here". The court stated (pages 248 or 566):

"At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial . . . . "

The *Berger* case involved continuous misconduct of the prosecuting attorney. The court described this conduct as follows (pages 84 or 631):

"That the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty of misstating the facts in his cross-examination of wit-

nesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner . . . . "

The court then held (pages 89 or 633):

"In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming', a different conclusion might be reached. Compare Fitter v. United States (C. C. A.) 258 F. 567, 573; Johnson v. United States (C. C. A.) 215 F. 679, 685, L. R. A. 1915A, 852; People v. Malkin, 250 N. Y. 185, 201, 202, 164 N. E. 900; State of Iowa v. Roscum, 119 Iowa, 330, 333, 93 N. W. 295. *Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded*". (emphasis supplied).

It is apparent, therefore, that the prejudice to the defendant's substantial rights in both the *Vierick* and *Berger* cases was directly achieved by the prosecuting attorney, not by a single instance but in unmistakable language appealing to prejudice and passion in the one case and in pronounced and persistent misconduct in the other. In the instant case, reliance is had by petitioner upon one

incident, which involved him only indirectly and the witness Guarini and his defense counsel directly and which, in the final analysis, was not prejudicial but benefited the petitioner's case in view of the elicited testimony from the witness (Pb44).

The case of *Dennis v. United States*, 339 U. S. 162, 70 S. Ct. 519 (1950) cited by petitioner (Pb36) is not applicable. In this case Dennis was convicted for wilfully failing to appear before the Committee on Un-American Activities of the House of Representatives in compliance with a subpoena served upon him. Certiorari was granted but limited to the question whether Government employees could properly serve on the jury which tried petitioner. The court held that Dennis was tried by an "impartial jury" and affirmed the conviction.

Petitioner also cites *Chambers v. Florida*, 309 U. S. 228, 60 S. Ct. 472, (1940) (Pb48). This case is inapplicable as it concerned the denial of due process because of the improper obtaining of a confession.

Petitioner cites a number of cases in the New York Court of Appeals. The case of *People v. Fielding*, 158 N. Y. 542, 53 N. E. 496 (1899) is analogous to *Berger v. United States supra*. The persistent and violent speech of the prosecuting attorney in his summation to the jury prompted a reversal. The court described this misconduct as follows (p. 500):

> " . . . improper appeals to sympathy, prejudice, or passion, the starvation of children by their widowed mothers, the knotted fingers and bent forms of old men, the denunciation of the defendant as a thief, or the bugbear of the unpardonable sin, held up before the jury so forcibly . . . . defendant . . . . has not had the fair and impartial trial which the law prescribes for a person charged with crime".

This case is clearly distinguishable from the instant case where no prejudice inured to the petitioner in the

testimony elicited by the prosecutor from the witnesses Guarini and Marchese and where the element of persistency was lacking because of the isolated incidents in a long trial and finally because even if we assume that error was committed it was not in summation or in the charge to the jury where lasting impressions on the minds of the jury are made but in an exchange between counsel for the State and defense and a witness (not the petitioner) who was on the stand.

In *People v. Wolf,* 183 N. Y. 464, 76 N. E. 592, (1906), the quotation cited by petitioner places this case in the same category as *People v. Fielding (supra) and Berger v. United States (supra).* This is as follows (Pb36):

> "The trial judge allowed and sanctioned *continuous departures from the law by the prosecuting attorney,* although he should have known that it was his duty to prevent them, . . ."

In this case, the prosecutor alluded to other crimes, not charged in the indictment, committed upon the person of the complaining witness by parties other than the defendant, and this, in his opening address to the jury. The prosecutor then committed a number of other violations in the trial of the cause, all of which added together amounted to a denial of a fair trial.

The case of *People v. Levan,* 285 N. Y. 296, 64 N. E. 2d 341, (1945) involved argument of the prosecuting attorney on summation in a capital case where he invoked passion and prejudice by his emphatic statement described by the court as follows (p. 346):

> "We cannot say, however, with assurance that the jury did disregard the clear implications from the emphasis placed by the prosecuting attorney upon the damning fact that the defendant had absented himself without leave from his military duties in a time of war. The virus thus implanted in the minds of the jury is not so easily extracted".

Petitioner also cites *State v. Grillo*, 112 N. J. 193 (1952). This case held that confessions obtained from defendants charged with murder were voluntary and that statements of the prosecuting attorney that defendants were members of an organized criminal group, and that the statute providing for recommendation of life imprisonment was not intended to apply to the defendants, were not grounds for reversal.

The case of *United States v. Marzano*, (C. C. A. 2d) 1945, 149 F. 2d 923, cited by petitioner is distinguishable from the instant case because of the misconduct of the trial judge who called two co-defendants as witnesses who had pleaded guilty and were awaiting sentence, and, upon their refusal to implicate defendant in reminding co-defendants the judge was going to sentence them and then asked them if they desired to change their testimony. This was error predicated upon the theory that the testimony of co-defendants must be satisfactory to the court to secure favor.

POINT IV

There was no error in the admission of testimony.

Petitioner states that "in the first volume of the record alone sixty (60) objections to the admission of 'testimony' were made and '55 of which were overruled'". He then avers that "the following are references to testimony which had no relation to issues involved therein". (Pb28 to 31)

Rule 1:5-1 of the Rules of the Supreme Court of New Jersey, supra, provides:

> " . . . Error in the admission . . . of testimony, . . . or in the denial by the court of any matter resting in discretion, or in any other ruling or order made dur-

ing the course of the trial, shall be cause for reversal if specific objection thereto was made and it appears from the entire record of the proceedings had upon the trial that the defendant thereby suffered manifest wrong or injury"

Petitioner does not state where he suffered any manifest wrong or injury as the result of the admission of irrelevant testimony. In fact, the gaming operations which this testimony sought to prove was finally admitted by the petitioner in his brief in the Supreme Court of New Jersey (Db29).

Furthermore, the petitioner points out in his brief in the court below (Db50 and Db51) that the State's witnesses may be classified in four (4) groups (a) the telephone company and the telegraph company employees who testified as to the installation of telephone and tickers at the various locations in Lodi; (b) the participants in the bookmaking activities (Db50), "These were the Erickson employees, the Jula employees and the Wright employees. There is no doubt about the fact that they were engaged in illegal gambling."; (c) (Db51). " . . . the persons who attended the gambling casinos to some illegal gambling with dice or other like games of chance."; and (d) the operators and employees of the gambling casinos, the stickmen, the restaurant manager, the credit manager, the porter, and others.

In this trial for the non-feasance of a police officer, testimony showing the prevalence of notorious and widespread gambling in the Borough of Lodi was admissible. And, even if we assume that the testimony was irrelevant, it is still the burden of petitioner under the New Jersey rule to point out the specific instances of manifest wrong and injury and beyond that, in this Court, the deprivation of any substantial right under the due process clause.

In this connection we refer to the case of *Banning v. United States,* (C. C. A., Mich.) 1942, 130 F. 2d, 330, certiorari denied, 63 S. Ct. 434, 317 U. S. 695, 87 L. Ed.

556 which held:

> "The admission of evidence which is irrelevant and immaterial because the facts sought to be proved are remote does not render such admission reversible error, unless the accused was prejudiced or harmed thereby or deprived of substantial rights."

Also in *State v. Shiren,* 15 N. J. Super. 440, 443, (App. Div. 1951, affirmed 9 N. J. 445) (Sup. Ct., 1952) the court said:

> "As a general proposition it may be said that any legally competent evidence which, when taken alone or in connection with other evidence, affords reasonable inferences upon the matter in issue, tends to prove or disprove a material issue or to defeat the rights asserted by one or the other of the parties, and sheds any light upon or touches the issues in such a way as to enable the jury to draw a logical inference with respect to the principal fact in issue, is relevant and admissible. 20 Am. Jur., Sec. 247, pp. 240, 241."

It is respectfully submitted that the petitioner has failed to point out error in the admission of testimony, or wherein the petitioner suffered manifest wrong or injury of any substantial right guaranteed to him by the basic principles inherent in the due process clause of the Constitution of the United States.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari to the Supreme Court of New Jersey should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 592

HENRY R. WITTE, *Petitioner,*

v.

THE STATE OF NEW JERSEY.

Petition for Rehearing on a Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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